Filed 12/16/04 (opn. following grant of rehearing)

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. PETER GUTIERREZ, Defendant and Appellant.	2d Crim. No. B169161 (Super. Ct. No. 2003000747) (Ventura County) OPINION ON REHEARING

In a criminal action the magistrate grants defendant's motion to suppress evidence. (Pen. Code, § 538.5.) [1] The prosecution successfully moves to reinstate the complaint pursuant to section 871.5. To challenge the validity of the search on appeal, must defendant first make a suppression motion before the superior court? No. Once the door has been shut on defendant, he is not required to knock again. He need not perform a useless act to preserve his right to appeal.

Peter Gutierrez appeals his conviction after a guilty plea to one count of possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)) and one count of forgery (§ 475, subd. (b)). Although Gutierrez may challenge the search and seizure we conclude it was constitutionally valid and affirm.

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*Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for partial publication. The portions of this opinion to be deleted from publication are identified as those portions between double brackets, e.g., [[/]].

[1] All statutory references are to the Penal Code unless otherwise stated.

[[FACTS

On January 6, 2003, Officer Chad Nichols of the Port Hueneme Police Department was on patrol. At approximately 11:00 p.m., he saw a white van double-parked in the alley of an apartment building. He testified that the area was known for narcotics transactions. He also said that based on his training and experience, narcotics transactions took place in the following manner: a vehicle pulls up, narcotics are purchased, and the vehicle leaves.

Nichols believed that double parking was a violation of the Port Hueneme municipal code. He pulled his patrol car behind the van to issue a parking citation. After he stopped behind the van, it could not go forward without hitting the building nor backward without hitting the patrol car.

Nichols walked up to the driver's side window of the van. Two people were inside. Gutierrez was sitting in the driver's seat. Nichols noticed that Gutierrez was extremely nervous. Gutierrez's hands were shaking and he had difficulty speaking clearly. Nichols asked if Gutierrez was on probation, and he admitted that he was. Nichols confirmed through police dispatch that Gutierrez was on probation and his probation had a provision under which he consented to a search. When Nichols first approached the van, he was alone. At some point, another officer arrived and parked behind his patrol car.

Nichols told Gutierrez that he was invoking the search provision of his probation. Gutierrez replied, "fuck," and began shaking his head. A patdown search revealed a baggie with methamphetamine residue and a baggie of marijuana. A search of Gutierrez's van revealed a nine-millimeter handgun, a baggie containing methamphetamine and a carrying case containing checks, checkbooks, credit cards, social security cards and driver's licenses with various names and addresses.

Gutierrez was parked on private property. The city's code enforcement administrator testified that some private property owners have a written agreement with the city for enforcement of the parking code. There was no such agreement for the

property on which Gutierrez was parked. Nichols testified he believed it is illegal to double-park even on private property.]]

DISCUSSION

I

The Attorney General contends that Gutierrez is procedurally barred from challenging the validity of the search and seizure.

The Attorney General does not contest that when the issue is properly preserved in the trial court, a defendant may seek review of the validity of the search and seizure on appeal from his conviction after a plea of guilty. (§ 1538.5, subd. (m).) The Attorney General points out, however, that section 1538.5, subdivision (m), provides in part, "Review on appeal may be obtained by the defendant provided that at some stage of the proceedings prior to conviction he . . . has moved for . . . the suppression of the evidence." The Attorney General cites *People v. Lilienthal* (1978) 22 Cal.3d 891, 896-897, for the proposition that to preserve the issue it is not enough to raise it at the preliminary hearing. Instead, the defendant must make a motion in superior court pursuant to section 1538.5 or 995. (*Ibid*.)

It is true the only motion to suppress evidence that Gutierrez made here was before the magistrate. But the superior court considered the validity of the search in granting the prosecution's motion pursuant to section 871.5. It makes no sense to require the defendant to make a motion in superior court when that court has already rejected the defendant's arguments in granting the prosecution's section 871.5 motion.

Section 871.5, subdivision (g), recognizes the futility of requiring the defendant who has lost a section 871.5 motion to make a section 995 motion in superior court prior to seeking a review by writ. Section 871.5, subdivision (g), provides that a defendant who loses a motion pursuant to section 871.5 may waive further proceedings before the magistrate, consent to the filing of the information, and "adopt as a motion pursuant to Section 995, the record and proceedings of the motion taken pursuant to this section and the order issued pursuant thereto, and may seek review of the order in the manner prescribed in Section 999a [writ of prohibition]."

Similarly, the defendant who loses a section 871.5 motion need not perform the idle task of making a section 1538.5 or 995 motion in superior court in order to preserve the issue for appeal.

The Attorney General's reliance on *Lilienthal* is misplaced. There the prosecution did not make a section 871.5 motion. Thus the court did not consider whether the prosecution's section 871.5 motion is sufficient to preserve the issue for appeal. The court decided that raising the matter only at the preliminary hearing is not sufficient on the theory that "it would be wholly inappropriate to reverse a superior court's judgment for error it did not commit and that was never called to its attention. [Fn. omitted.]" (*People v. Lilienthal*, *supra*, 22 Cal.3d at p. 896.) That rationale does not apply where, as here, the matter was considered by the superior court on the prosecution's section 871.5 motion.

Gutierrez is not procedurally barred from raising the validity of the search and seizure on appeal.

[[II

Gutierrez contends the search and seizure was based on an unlawful detention.

A detention is the seizure of a person that is limited in duration, scope and purpose. (*In re Manuel G.* (1997) 16 Cal.4th 805, 821.) Unlike detention, a consensual encounter requires no articulable suspicion that the person has committed or is about to commit a crime. (*Ibid*.) A detention does not occur when a police officer merely approaches a person on the street and asks a few questions. (*Ibid*.) Only when an officer, by means of physical force or show of authority, restrains a person's liberty does a detention occur. (*Ibid*.) The question is whether considering all the circumstances, a reasonable person would feel free to decline the officer's requests or otherwise terminate the encounter. (*Ibid*.) Circumstances establishing a detention may include the presence of several officers, display of a weapon, touching of the person, or use of language or tone of voice indicating compliance might be compelled. (*Ibid*.)

Gutierrez argues he was detained when the police parked behind his van. If he drove forward, he would hit the wall of the apartment building; if he drove backward he would hit the police car. Gutierrez claims the articulated suspicion that he committed or was about to commit a crime was that he was double-parked. But the police had no authority to enforce traffic laws on the premises on which he was parked. Gutierrez cites *People v. White* (2003) 107 Cal.App.4th 636, 644, for the proposition that a valid detention cannot be based on a mistake of law.

Gutierrez also points out that the police did not know he was on probation at the time the detention began. He cites *People v. Sanders* (2003) 31 Cal.4th 318, 335, for the proposition that a search cannot be justified by a search condition of which the police were unaware when the search was conducted.

In reviewing the grant of a section 871.5 motion, we defer to the factual findings of the magistrate, not the superior court. (See *People v. Woods* (1993) 12 Cal.App.4th 1139, 1148-1149.) In determining whether under the facts so found the search and seizure was reasonable under the Fourth Amendment, we exercise our independent judgment. (*People v. Glaser* (1995) 11 Cal.4th 354, 362.)

The Attorney General suggests Gutierrez was free to leave his van and walk away. But it is not reasonable to expect that a person would leave his car at 11:00 o'clock at night and walk off into the darkness. When the police stopped behind the van, Gutierrez was prevented from leaving. He was not free to terminate the encounter.

Even though Nichols' initial encounter with Gutierrez amounted to a detention, the search was reasonable. A detention is constitutionally valid if circumstances known or apparent to the detaining officer include specific and articulable facts causing him to suspect that some activity relating to a crime has taken place, is occurring or is about to occur, and the person he intends to detain is involved in that activity. (*People v. Daugherty* (1996) 50 Cal.App.4th 275, 285.) The possibility of an innocent explanation does not deprive the officer of the capacity to entertain a reasonable suspicion. (*Ibid*.)

Here Nichols saw Gutierrez's van double-parked at 11:00 o'clock at night in an area known for narcotics transactions. Nichols testified, based on his training and experience, that it is common for narcotics transactions to take place in that manner, where vehicles pull up, narcotics are purchased, and the vehicles leave. That is sufficient for the officer to form a reasonable suspicion that criminal activities were taking place and that Gutierrez was involved. That Gutierrez may have been innocently parked, does not prevent the officer from forming a reasonable suspicion justifying a detention.

Nichols' initial contact with Gutierrez was justified as a lawful detention. Nichols could immediately see that Gutierrez exhibited symptoms of being under the influence. That justified further investigation, including ascertaining Gutierrez's probation status and search condition. Gutierrez's search condition justified the search of the van. The superior court did not err in granting the prosecution's section 871.5 motion.]]

The judgment is affirmed.

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GILBERT, P.J.

We concur:

COFFEE, J.

PERREN, J.

Bruce A. Clark, Judge

Superior Court County of Ventura

Richard C. Gilman, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Victoria B. Wilson, Supervising Deputy Attorney General, and Sharon E. Loughner, Deputy Attorney General, for Plaintiff and Respondent.